No. 78-640

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA EX REL. PETER O. ABELES,

Petitioner,

vs.

RICHARD J. ELROD, SHERIFF OF COOK COUNTY, ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the petitioner had no constitutional or statutory right to a hearing before the Governor of the State of Illinois prior to the issuance of the extradition warrant.

2. Whether the petitioner was substantially charged with an offense under Wisconsin law where the language of the Wisconsin indictment was upheld by the Wisconsin Supreme Court which affirmed the conviction of petitioner's co-defendant for the offense charged in the indictment challenged here by the petitioner.

STATEMENT OF THE CASE

Petitioner has omitted from his Statement of the Case the fact that he filed a Petition for Rehearing and Suggestions for Rehearing *En Banc* in the United States Court of Appeals for the Seventh Circuit. That Petition was filed on August 22, 1978. In essence, that petition reiterated petitioner's argument concerning the lack of a hearing before the Governor of the State of Illinois prior to his issuance of the extradition warrant. Additionally, the petition suggested that the Court of Appeals for the Seventh Circuit failed to consider that Wisconsin's extradition request was based on an outdated indictment that failed to charge a crime. The petition for rehearing *en banc* was denied on September 12, 1978.

ARGUMENT

I.

THE PETITIONER HAD NO CONSTITUTIONAL OR STATUTORY RIGHT TO A HEARING BEFORE THE GOVERNOR OF THE STATE OF ILLINOIS PRIOR TO THE ISSUANCE OF THE EXTRADITION WARRANT.

Petitioner contends that *Munsey* v. *Clough,* 196 U.S. 364 (1905) should be overruled. He contends that prior notice and hearing are constitutionally required under evolving standards of due process. Respondent submits that this contention is meritless. The Circuit Court of Appeals was clearly correct in refusing to "break tradition with the time honored precedent established by the decision in *Munsey, Supra.*" (App. 8). Petitioner has failed to cite a single case and respondent is aware of none, which is in conflict with the Court of Appeals' decision in this case.

It is well settled that extradition proceedings before a state governor are, by nature, summary. Sound policy reasons, articulated more than seventy years ago in *Munsey* v. *Clough, supra,* exist in this extradition case and justify the procedures that were followed. Recently, this Court re-affirmed its position with regard to the nature of extradition proceedings. "To allow plenary review in the asylum state of issues that can be fully litigated in the charging state would defeat the plain purposes of the summary and mandatory procedures authorized by Art. IV, Sec. 2." *Michigan* v. *Doran,* ..... U.S. ..... (No. 77-1202), December 18, 1978).

None of the cases cited by petitioner purporting to expand the scope of due process involved an extradition proceeding. None of the cases cited by petitioner provide for the notice and hearing sought by petitioner. Respondent has found no cases extending the rules in cases such as *Morrissey* v. *Brewer,* 408 U.S. 471 (1972), and *Sniadach* v. *Family Finance Corporaton,* 393 U.S. 337 (1969), to extradition proceedings. Recent decisions of this Court refute petitioner's contention that the Court has increasingly applied evolving due process standards to summary proceedings. In *Matthews* v. *Eldridge,* 424 U.S. 319 (1976) and *Dixon* v. *Love,* 431 U.S. 105 (1977), cases involving termination of disability benefits and suspension of driver licenses, respectively, this Court held that due process did not require hearings prior to the termination of disability benefits or licenses. Most appropriate to this case is the statement of the Court in *Eldridge,* "The judicial model of an evidentiary hearing is neither a required, nor even the most effective method of decision making in all circumstances." Id. *Eldridge,* 424 U.S. at 348.

Petitioner argues that he should have been allowed to tell his side of the story for the Governor so that injustice would not be done. (Pet. Br. 11). Here, as in *Eldridge,* existing *habeas corpus* procedures before the state courts of Illinois exist and were utilized by petitioner. *Habeas corpus* proceedings in the Circuit Court of Cook County, Illinois, and review of those proceedings by the Appellate Court of Illinois, eliminated the risk of an erroneous deprivation of the private interest asserted by petitioner. The Uniform Criminal Extradition Act, Ill. Rev. Stat. Ch. 60, Sec. 18 *et seq.,* fully protected petitioner's right to be assured that extradition was not based on erroneous information.

The petitioner had no right to a hearing before the Governor. *Munsey* v. *Clough, supra,* 196 U.S. at 372. At the very most, a hearing was within the Governor's discretion. As correctly noted by the Circuit Court of Appeals, the record in this case indicates that petitioner made no attempt to apply for such a discretionary hearing even though such a hearing could have been sought as late as after the issuance of the extradition warrant. (App. 8).

Here, petitioner is asserting the right to appear before the Governor only to argue for leniency. A similar argument was raised in *Dixon* v. *Love, supra.* Respondent submits that such an appearance may make petitioner feel that he has received more personal attention, but as in *Dixon* v. *Love, supra,* it would not serve to protect any substantive rights.

II.

THE PETITIONER WAS SUBSTANTIALLY CHARGED WITH AN OFFENSE UNDER WISCONSIN LAW WHERE THE LANGUAGE OF THE INDICTMENT WAS UPHELD BY THE WISCONSIN SUPREME COURT WHICH AFFIRMED THE CONVICTION OF PETITIONER'S CO-DEFENDANT FOR THE SAME OFFENSE CHARGED IN THE INDICTMENT CHALLENGED HERE BY THE PETITIONER.

Petitioner argues that the Court of Appeals failed to analyze whether the indictment returned against him charged a crime. Respondent submits that the Court of Appeals did determine that the indictment against petitioner charged an offense. (App. 5-6). This precise question was raised by petitioner's co-defendant in the Supreme Court of Wisconsin.

The February 28, 1973, Wisconsin indictment against his co-defendants and him charged conspiracy "to restrain

competition in the supply or price of an article or commodity" in violation of Wisconsin Statutes, Section 133.01 (1) (3). Petitioner argues that "it is undisputed that this indictment did not validly charge a crime, since the business activities of Waste Management (a co-defendant) did not involve articles or commodities." (Pet. Br. 15) Respondent greatly disputes this assertion as did the Attorney General of Wisconsin. In *State of Wisconsin* v. *Waste Management of Wisconsin,* 81 Wis. 2d 555, 261 N.W. 2d 147 (1978), cert. denied ..... U.S. ....., 58 L.Ed.2d 175 (October 2, 1978), the Wisconsin Supreme Court considered Waste Management's argument that the indictment did not charge a crime under Wisconsin law because solid waste removal was a "service" and not an "article or commodity." The court held that restraint of services was also within the statutory prohibition and that the second sentence of Section 133.01 (1) (App. 16) merely recited non-exclusionary examples of prohibited conduct.

The petitioner contends that the Court of Appeals did not consider whether the original indictment stated an offense. Yet, the Court of Appeals did consider this issue in their opinion. The petitioner raised this issue in his petition for rehearing in the Court of Appeals and that court's denial implicitly shows that court's awareness of the issue.

Extradition is a summary process. It is according to the law of Wisconsin, the State whose laws are alleged to have been violated, that the indictment must be construed. Indeed, the Wisconsin Supreme Court has resolved this question against petitioner. At the very least, there is no question but that the indictment filed against petitioner *substantially* charges him with an offense under Wisconsin law.

In this case especially, it is apparent from the face of the indictment that a charge was stated, notwithstanding the presence of the words "article or commodity". Paragraphs 17 and 18 (a) (b) (c) and (d) of the indictment explicitly and comprehensively detail the acts alleged to have been committed by petitioner. (Those paragraphs are set out in *People ex rel. Abeles* v. *Elrod,* 27 Ill. App. 3d 155, 157, 326 N.E. 2d 443, 445 (1st Dist. 1975) The existence of actual prejudice to petitioner is not shown. A forum, indeed the most appropriate forum, exists and is waiting for petitioner to litigate his claims as to the sufficiency of the indictment. That forum is the state court system of Wisconsin.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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January 2, 1979